IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
LARRY BROWN,	§	
	§	
Debtor.	§	CASE NO. 04-42064-DML-11

MEMORANDUM OPINION AND ORDER

Before the court is City Bank's Objection to the Claim of Industrial Bank, N.A. (the "Objection") filed June 23, 2004. Industrial Bank's Response in Opposition to City Bank's Objection was filed July 12, 2004; and City Bank's Reply to Industrial Bank's Response was filed September 21, 2004. Larry Brown's ("Debtor") Joinder in the Objection was filed September 24, 2004.

Also before the court is the Motion of Industrial Bank to Annul Automatic Stay (the "Motion to Annul") filed August 26, 2004. City Bank's Response to Industrial Bank's Motion to Annul was filed September 10, 2004, and Industrial Bank's Reply in Support of Its Motion to Annul was filed September 24, 2004. Debtor's Joinder in City Bank's Response to the Motion to Annul was also filed September 24, 2004.

Also before the court is City Bank's Alternative Motion for Authority to Avoid Postpetition Attachment of Alleged Security Interest of Industrial Bank (the "Alternative Motion") filed September 16, 2004. Industrial Bank's Response to the Alternative Motion was filed September 24, 2004.

A hearing on the Objection, the Motion to Annul, and the Alternative Motion was held on September 27, 2004. At the conclusion of the hearing, the court invited the parties to submit supplemental briefs relevant to the issues raised at the hearing and took the matter under advisement. Both City Bank and Industrial Bank filed Supplemental Briefs on October 4, 2004.

I. BACKGROUND

The facts of this case are largely undisputed. On August 5, 2002, Debtor filed a voluntary petition ("Case 1") under chapter 13 of the Bankruptcy Code.[1] Case 1 was initially dismissed on October 16, 2002; reinstated on November 19, 2002, pursuant to a timely motion; and finally dismissed on May 21, 2003. Although City Bank was not listed as a creditor on Debtor's original schedules, City Bank filed a Notice of Appearance and Request for Service of Papers as "a creditor of, and a party in interest in this [Case 1]" on December 11, 2002, and filed a proof of claim on January 27, 2003. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 1. During the pendency of Case 1, Industrial Bank sued Debtor on September 23, 2002; obtained a default judgment (the "Judgment") on February 10, 2003, and recorded the Judgment against Debtor on March 28, 2003.

On June 3, 2003, thirteen days after dismissal of Case 1, Debtor filed a voluntary petition ("Case 2") under chapter 11 of the Code. Case 2 was dismissed on January 7, 2004. City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 2. During the pendency of Case 2, Industrial Bank obtained in connection with

[1] 11 U.S.C. §§ 101-1330 (2004) (hereafter the "Code").

the Judgment a writ of execution against Debtor on June 25, 2003, and gave Debtor notice of levy under the writ of execution on August 28, 2003.

On February 27, 2004, fifty-one days after dismissal of Case 2, Debtor filed the above-captioned chapter 11 case ("Case 3"). City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 3. On March 19, 2004, during the pendency of Case 3, Industrial Bank obtained in connection with the Judgment an order granting post-judgment sanctions against Debtor.

On March 26, 2004, Industrial Bank received notice of Case 3 and in April 2004 learned of Debtor's Case 1 and Case 2. On May 20, 2004, Industrial Bank filed in Case 3 a secured creditor Proof of Claim based on the Judgment.

II. DISCUSSION

Pursuant to the provisions of sections 502 and 506 of the Code, City Bank objects to Industrial Bank's claim and asserts that all actions taken by Industrial Bank during the pendency of Cases 1, 2, and 3 to obtain, perfect, and enforce the Judgment were in violation of the automatic stay provisions of sections 362(a)(1)-(a)(5)[2] of the Code. City Bank's Objection asks

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[2] Section 362 provides in relevant part:

> (a) [A] petition filed . . . under this title . . . operates as a stay, applicable to all entities, of –
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the

this court to disallow Industrial Bank's claim as a secured claim and, at best, to allow as unsecured any claim established by Industrial Bank pursuant to the Judgment. Industrial Bank argues that (1) creditor City Bank lacks standing to challenge Industrial Bank's claim; (2) the dismissal of Case 1 terminated the automatic stay and retroactively validated Industrial Bank's actions in connection with the Judgment; and (3) regardless of the effect of the dismissal of Case 1, cause exists for this court to annul the automatic stay and to retroactively validate the Judgment and allow Industrial Bank's secured claim.

Consistent with its position in response to City Bank's Objection, Industrial Bank's Motion to Annul maintains that cause exists for this court to annul the automatic stay and to retroactively validate Industrial Bank's actions taken to obtain, perfect, and enforce the Judgment, notwithstanding Debtor's filing of Cases 1, 2, and 3. City Bank argues that retroactive validation of Industrial Bank's Judgment as a secured claim would unfairly allow Industrial Bank to improve its position over the claims of those unsecured nonpriority creditors who faithfully adhered to the strictures of the automatic stay.

> estate, of a judgment obtained before the commencement of the case under this title;
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> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

Code §§ 362(a)(1)-(a)(5).

Finally, City Bank's Alternative Motion seeks this court's *imprimatur* for City Bank to act in Debtor's stead in objecting to Industrial Bank's claim. City Bank argues that authority for City Bank to act on Debtor's behalf should be granted because Debtor failed to raise an objection to Industrial Bank's claim despite City Bank's repeated requests for Debtor to do so and, indeed, despite Debtor's *duty* to do so. Industrial Bank responds that City Bank lacks a colorable claim and should therefore not be granted authority to act on behalf of Debtor.[3]

First. It is well established that the "purposes of the bankruptcy stay . . . are 'to protect the debtor's assets, provide temporary relief from creditors, and *further equity of distribution among the creditors* by forestalling a race to the courthouse.'" *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) (emphasis added). *See also GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985) (same); *Singleton v. Abusaad (In re Abusaad)*, 309 B.R. 895, 897 (Bankr. N.D. Tex. 2004) (same); *Elbar Invs., Inc. v. Pierce (In re Pierce)* (hereafter "*Pierce I*"), 272 B.R. 198, 203-04 (Bankr. S.D. Tex. 2001) ("The stay is intended to benefit both debtors and creditors by assuring an equitable distribution of the debtor's assets and by preventing a race to the courthouse.").

Industrial Bank asks this court to overrule City Bank's Objection and to allow Industrial Bank's Judgment as a secured claim with a perfected lien against Debtor's National Football League deferred contract payments. Though the court agrees with Industrial Bank that Debtor should not be allowed to benefit from the protections of the automatic stay by remaining

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[3] Although it is likely this court would have granted City Bank's Alternative Motion based on the plain language of section 502(b) of the Code which allows a "party in interest" to object to a filed claim, Debtor's subsequent Joinder in the Objection and Joinder in the Motion to Annul effectively rendered the Alternative Motion moot.

"stealthily silent," *see In re Smith Corset Shops, Inc.*, 696 F.2d 971, 977 (1st Cir. 1982), while Industrial Bank obtained the Judgment from state court, the court also believes that City Bank and other creditors in this case should not suffer a detriment because Debtor failed to give notice of its bankruptcy filings to Industrial Bank. Because allowance of the Judgment as a secured claim (1) would improve Industrial Bank's creditor status to the prejudice of City Bank and those other creditors obedient to the mandates of the automatic stay and (2) would not further the purposes of the Code and the equitable distribution of Debtor's assets among creditors, the court is convinced that the Judgment should not be allowed as a secured claim with a perfected lien against the deferred contract proceeds.

Second. It is well established that the stay is effective "regardless of whether creditors have knowledge of the stay's applicability." *Elbar Invs., Inc. v. Pierce (In re Pierce)* (*"Pierce II"*), 91 Fed. Appx. 927, 928 (5th Cir. 2004). *See also Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 236 (5th Cir. 2004) (determining that actions in violation of the automatic stay under section 362 of the Code are invalid, "whether or not a creditor acts with knowledge of the stay"); *In re Abusaad*, 309 B.R. at 898 (finding that sheriff's sale violated automatic stay regardless of whether sheriff or purchaser had knowledge of the filing of the petition); *Pierce I*, 272 B.R. at 203 ("The stay is not a judicial injunction that depends on notice. The stay is effective upon the filing of the case, regardless of notice.").

Industrial Bank does not dispute that its actions taken to obtain, perfect, and enforce the Judgment were taken while the automatic stay was in effect postpetition and during the pendency of Cases 1, 2, and 3, albeit unknown to Industrial Bank at the time its actions were taken because Industrial Bank had not received notice of Debtor's filings. However, because the automatic stay

in Debtor's Cases 1, 2, and 3 was effective upon the filing of the cases regardless of notice to Industrial Bank, the court holds that Industrial Bank's actions taken postpetition and during the pendency of Cases 1, 2, and 3 violated the automatic stay notwithstanding that Industrial Bank had no actual notice of Debtor's filings.

Third. It is firmly established in the Fifth Circuit that actions in violation of the automatic stay are not void *ab initio* and incurable but, rather, "are merely 'voidable' and are subject to discretionary 'cure.' The Fifth Circuit's position rests on the bankruptcy court's statutory power to annul the automatic stay, *i.e.*, to 'lift the automatic stay retroactively and thereby validate actions which otherwise would be void."[4] *Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.)*, 345 F.3d 338, 344 (5th Cir. 2003). *See also In re Abusaad*, 309 B.R. at 899 (clarifying that unless and until an action taken in violation of the automatic stay "is made valid by subsequent judicial action annulling the automatic stay," it is clear that such action is invalid and of no effect); *In re Cueva*, 371 F.3d at 236 n.2 (noting that the bankruptcy court is afforded broad discretionary authority to retroactively annul the automatic stay to validate actions taken in violation of the stay); *Thornburg v. Lynch (In re Thornburg)*, 277 B.R. 719, 731 (Bank. E.D. Tex. 2002) ("Bankruptcy courts ordinarily must hold those who defile the automatic stay to the predictable consequences of their actions and can grant retroactive relief only sparingly and in compelling circumstances.") (citation omitted); *Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412 (5th Cir. 1995) (affirming that "actions taken in violation of the automatic stay are not *void*, but rather they are merely *voidable*, because the bankruptcy court has the power to annul the

[4] Section 362(d) authorizes the bankruptcy court to "grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . ." Code § 362(d).

automatic stay pursuant to section 362(d)") (emphasis in original); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) ("The power to annul authorizes the court to validate actions taken subsequent to the impressing of the section 362(a) stay.").

Industrial Bank insists that compelling circumstances exist to annul the automatic stay and retroactively validate its Judgment. *See In re Thornburg*, 277 B.R. at 731 n.18 (setting forth examples of circumstances considered compelling by courts in granting such extraordinary relief, including (1) if the creditor had actual or constructive knowledge of the bankruptcy filing; (2) if the debtor has acted in bad faith; (3) if there was equity in the property of the estate; (4) if the property was necessary for an effective reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; and (7) if the creditor has detrimentally changed its position on the basis of the action taken). Even assuming *arguendo* that Debtor's failure to give Industrial Bank notice of the Cases was unreasonable, Industrial Bank has offered nothing more than (1) conclusory allegations that it detrimentally changed its position based on lack of notice of the Cases; (2) speculative conclusions that it would have prevailed had a motion for relief been granted prior to the violation; and (3) unsubstantiated allegations of past or anticipated unnecessary expenditures. Indeed, the equities in this case weigh in favor of the court's belief that Industrial Bank must share the same unsecured nonpriority creditor status in Case 3 as the other unsecured nonpriority claimants and that Industrial Bank should not be allowed to reap benefits resulting from its violation of the statutory

automatic stay.[5] *See Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 975 (1st Cir. 1997) (explaining that the automatic stay "safeguards . . . creditors by preventing 'different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all . . . to capture the lion's share of the debtor's assets'"); *In re U. S. Physicians, Inc.*, 236 B.R. 593, 605-06 (Bankr. E.D. Pa. 1999) (determining that "unsecured creditors are generally entitled to relief only where they have demonstrated that the debtor had engaged in morally culpable conduct" and unsecured creditors who are denied relief "will simply share the same financial status with the other frustrated" creditors).

It appears from the record that City Bank and Debtor's other creditors hold claims that antedate Industrial Bank's violations of the stay. Had the claims of creditors arisen after Industrial Bank recorded its judgment, thus putting creditors on notice, the result here might be different. But where, as here, Debtor's three filings were intended to restructure the same debt, it would frustrate Congress's intent to recognize as valid Industrial Bank's secured claim.[6]

Therefore, because Industrial Bank has failed to show compelling circumstances for this court to disregard the safeguards of the automatic stay and, consistent with the court's reasoning *supra*, the court declines to (1) annul the stay; (2) retroactively validate Industrial Bank's actions taken to obtain, perfect, and enforce the Judgment in violation of the stay; and (3) elevate

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[5] The test fashioned by the *In re Thornburg* court involved enforcement of a valid lien. Industrial Bank asks much more of this court. Industrial Bank asks this court to permit it to take advantage of its stay violations to bootstrap itself into a position ahead of other creditors who otherwise would be treated on a parity with Industrial Bank.

[6] The court notes that Debtor was the subject of a bankruptcy proceeding during all times pertinent to the matter at hand except for 62 days. Under Code section 108(a), *cf.* Code section 546(a)(1), pendency of a bankruptcy tolls the time for commencing suits. Thus, Industrial Bank's lien might in any case be attacked in Case 3 as a preference. *See* Code § 547(b).

Industrial Bank's creditor status regarding the Judgment over those creditors' claims made in compliance with the terms of the automatic stay.

CONCLUSION

Having conducted a hearing, received evidence and testimony, and reviewed the record before the court, and the court hereby **SUSTAINS** the Objection to Industrial Bank's secured claim; **DENIES** the Motion to Annul; and **DENIES** as moot the Alternative Motion. Industrial Bank's claim shall be **ALLOWED** as a general unsecured nonpriority claim.

SO ORDERED this _____ day of November 2004.

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DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE